# COURT OF APPEALS DECISION DATED AND FILED

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Diane M. Fremgen Clerk of Court of Appeals

#### **NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1763-CR STATE OF WISCONSIN

Cir. Ct. No. 2010CF529

## IN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICENTE PAUL VENTO,

**DEFENDANT-APPELLANT.** 

APPEAL from a judgment of the circuit court for Milwaukee County: GLENN H. YAMAHIRO and DENNIS R. CIMPL, Judges. Reversed and cause remanded with directions.

Before Curley, P.J., Fine and Kessler, JJ.

<sup>&</sup>lt;sup>1</sup> The Honorable Glenn H. Yamahiro presided over the trial and issued the judgment of conviction. The Honorable Dennis R. Cimpl presided over the sentencing.

¶1 CURLEY, P.J. Vicente Paul Vento appeals the judgment convicting him of one count of substantial battery, contrary to WIS. STAT. § 940.19(2) (2009-10).<sup>2</sup> Vento contends that he is entitled to a new trial in the interests of justice on the issue of his mental responsibility because there is a substantial probability that a new trial would produce a different result. Considering the evidence as a whole, we agree. Therefore, we grant a discretionary reversal under WIS. STAT. § 752.35 and remand with directions to conduct a new trial on the issue of Vento's mental responsibility.

### **BACKGROUND**

¶2 On January 31, 2010, Vento, a mentally ill man who was off his medications, violently attacked his neighbor. The attack left Vento's neighbor with a broken nose, fractures to his face and orbital cavities, numerous cuts, and bruising to his chest. Vento was charged with substantial battery, and pled not guilty and not guilty by reason of mental disease or defect.

#### Pre-trial Competency Evaluations

¶3 At Vento's initial appearance, the trial court ordered a competency examination. Vento was examined by psychiatrist Dr. John Pankiewicz, who was unable to offer an opinion regarding Vento's competency. Dr. Pankiewicz's report noted that Vento had been diagnosed with a psychotic disorder in the 1980's, a diagnosis Dr. Pankiewicz agreed with, and that Vento was confused and uncooperative during the exam. Because Dr. Pankiewicz did not have adequate

 $<sup>^2</sup>$  All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

information to offer an opinion about Vento's competency to a reasonable degree of medical certainty, he recommended that Vento be remanded to a state mental health institution for an inpatient examination.

¶4 Vento was subsequently evaluated by psychiatrist Dr. Erik Knudson, who opined that Vento was not competent to stand trial because he lacked substantial mental capacity to understand the proceedings and assist in his defense. Dr. Knudson explained that Vento was extremely difficult to understand and showed severe symptoms of mental illness. Dr. Knudson diagnosed Vento with schizophrenia and opined:

Vento presents with a very elaborate delusional system that involves government conspiracies, beliefs that his identity has been tampered with through electronic means, fears about people tampering with his body, and reports of hallucinatory experiences. He has no insight into his need for treatment. Vento's symptoms are similar to those psychotic episodes frequently observed with either bipolar disorder or paranoid schizophrenia. There is some suggestion of mood instability in his presentation.

- ¶5 Dr. Knudson further opined that Vento could be restored to competency if provided inpatient psychiatric treatment, which would require the involuntary administration of antipsychotic and possibly mood-stabilizing medications. Dr. Knudson opined that medications could reduce the frequency and intensity of Vento's symptoms. Involuntary administration was required because Vento claimed he did not have any mental health problems and refused to take his medications.
- ¶6 The trial court found Vento not competent, but likely to become competent. The court ordered the involuntary administration of psychotropic medication, finding that Vento posed a risk of harming himself or others if not medicated. After about two months of inpatient treatment, Vento's competency

was re-evaluated. Dr. Ed Musholt, who evaluated Vento, reported that Vento had attained stability, and the proceedings against Vento were reinstated.

#### <u>Trial</u>

¶7 After Vento attained competency, he stood trial for the battery charge. Both the guilt and mental responsibility phases of the case were tried to the court on the same day, April 4, 2011.

#### 1. Guilt Phase

- ¶8 The victim testified that the incident was entirely unprovoked and that Vento was in a "rage state." A neighbor who witnessed the attack called 911, and minutes later, police arrived.
- ¶9 Officer Robert Bennett, who arrived on the scene shortly after the incident, testified that he and the other officers called to the scene went to Vento's apartment and announced themselves, but initially got no response. Officer Bennett observed through a mail slot that Vento was lying face down on a bed. Officers kicked the locked door open and handcuffed Vento. Vento awoke and stated, "I have been sleeping in my apartment all day. How could I have just beaten someone up?"
- ¶10 According to Officer Bennett, once Vento realized that he was being taken into custody, he started to make statements that the victim had been harassing him, taking a hammer to his door, pounding on his door, and making sexual advances.
- ¶11 Officer Bennett testified that he was familiar with Vento because Vento visited the police department on a weekly basis and Bennett himself had

talked to Vento approximately thirty to forty times. Officer Bennett testified that Vento was generally cordial and friendly during these visits, albeit clearly delusional:

- Q: Now, you said [Vento] was a regular visitor of the Police Department, and what kind of stuff would he be talking about?
- A: Well, he would stop in and he would talk to us about different drug activity that was occurring. Appeared to me very often he was delusional in terms of he would talk about working with the FBI or CIA or he was an informant as far as a confidential informant, and he would have very vague types of information about who was doing what in the neighborhood. Things that, obviously, I didn't give any weight to because of his what I perceived where serious mental health issues.

According to Officer Bennett, Vento's demeanor during booking was the same as during his visits to the station when he was delusional.

- ¶12 Vento testified in his own defense. Vento testified that the day before the attack, the victim had hit him in the head with a hammer. Vento testified that he had reported the incident to police, and had told police that the victim had been making sexual advances on him. There was, however, no further evidence that Vento actually was hit in the head with a hammer, and no further evidence that Vento actually did tell police about his neighbor's alleged advances.
- ¶13 The trial court found that the State proved beyond a reasonable doubt that Vento committed substantial battery and that Vento did not act in self-defense.

## 2. Criminal Responsibility Phase

¶14 In phase two of the trial, the trial court heard testimony from two psychologists regarding whether Vento lacked substantial capacity either to

appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Dr. Daniela Jaramillo testified on Vento's behalf, and Dr. Deborah Collins testified on the State's behalf.

- ¶15 Dr. Jaramillo concluded that at the time of the offense, Vento was "actively psychotic." She further concluded that Vento "most likely could not conform his conduct" to the proper criminal standard.
- ¶16 Dr. Jaramillo's report noted a number of factors supporting her conclusion:
  - There was "a clear course of decompensation because of a mental disease leading up to the offense."
  - Vento was not taking his medication at the time of the incident.
  - Vento's "paranoid delusional beliefs" about the victim that he was being harassed by the victim; the victim propositioned him to engage in homosexual interactions; and the victim had a hammer and was planning on using it.
  - Shortly after the incident, Vento was found incompetent and was sent to Mendota Mental Health Institute for treatment.
  - If Vento was attempting to evade responsibility, he would have left the premises instead of remaining at his apartment and reportedly going back to sleep.
- ¶17 Addressing Vento's self-defense claim and explanations for the offense, Dr. Jaramillo testified, "I believe that he was actively psychotic at the time, suffering from delusions."
- ¶18 Dr. Jaramillo testified that while she could not be "a hundred percent sure" that Vento was psychotic during the offense, "given everything that I've read and even when interviewing him, there's still some residual symptoms of a

delusion." She acknowledged that Vento had been managing his own finances, living on his own, and had not been hospitalized within the year prior to the offense. Dr. Jaramillo explained, however, that Vento "could have been experiencing delusions the whole time but not to the point where he would actually act on them." Evidence that Vento went to the police department on a weekly basis and reported that he was an undercover CIA agent or FBI agent, supported her view that Vento was decompensating prior to the incident.

- ¶19 Dr. Collins, on the other hand, testified that, even assuming Vento's perceptions were the product of a delusional thought process, she could not conclude that Vento lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of the offense. Dr. Collins agreed that Vento was symptomatic at the time of the offense, and agreed that "there was the possibility that [Vento] was ... acting aggressively because of paranoid delusions about the victim," but she did not see the connection between the delusions and his actions. Dr. Collins explained that Vento had a history of aggression as he had previously been charged with battery; the victim was fearful of Vento and they had a contentious relationship; and, after the incident, Vento returned to his room and claimed he had been sleeping. Dr. Collins explained that "[w]hen someone tries to make efforts to evade responsibility, that suggests that they have the capacity to appreciate wrongfulness."
- ¶20 Under cross-examination, however, Dr. Collins admitted that she lacked important information at the time she reached her conclusion. For example, she did not know that Vento alleged that the victim hit him with a hammer, nor did she know that he alleged to have bumps—which did not exist—on his head from the alleged attack. She did not know that Vento had asserted that

the victim had propositioned him and that he claimed to have reported this to the police. Dr. Collins noted that that information "would have been potentially significant." Dr. Collins also agreed that it "certainly" would have been important for her to know that Vento had gone to the police on a weekly basis to report on various illusionary undercover operations. Furthermore, when Dr. Collins was questioned about the prior battery that she relied on in determining Vento's history of aggression, Dr. Collins noted that a printout in her file showed an arrest for battery in 2002; but the State clarified that Vento did not have any prior criminal convictions.

- ¶21 The trial court concluded that Vento met his burden to prove that he had a mental disease or defect at the time of the offense, but did not meet his burden to prove that he lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of the offense.
- ¶22 The trial court, noting that this was a "relatively close case," found that the defense did not meet its burden as to the second question. The court explained:

I think it's clear that Vento was suffering from delusional thought disorders, probably for the greater part of the year leading up to this incident. But I also find it significant that there is no evidence of any other acts of violence attributed to him during that time period, even though the record appears clear that he was off of his prescribed medication for the majority if not all that time period; that he was actively delusional based upon the testimony of the lieutenant with regard to their interactions ... that he was provided updates by the defendant which appeared to be the product of a delusional thought process.

• • • •

Is it possible that he was unable to conform his conduct? I would say it is possible on this date that he wasn't able to conform his conduct or appreciate the wrongfulness of it....

. . .

So even though it appears very likely that he was suffering some increase in his symptoms of his mental illness, in particular with regard to delusional thought processes, nevertheless he was able, it appears, to successfully maintain himself in the community, and to do so without generating any additional negative contact with law enforcement.

## Post-trial Proceedings

¶23 On May 24, 2011, during the hearing scheduled for sentencing, the trial court questioned Vento's competency. At a competency hearing about a month later, Dr. Pankiewicz, the psychiatrist who had examined Vento shortly after the initial appearance, testified that Vento was not competent, but was likely to regain competency with medication. Dr. Pankiewicz explained that Vento had stopped taking his medications, and had "a reoccurrence of symptoms interfering with his capacity for reality testing." The trial court found Vento incompetent and ordered treatment. In November 2011, Vento was found competent to proceed and was sentenced. Vento now appeals.

#### ANALYSIS

¶24 On appeal, Vento argues he is entitled to a new trial in the interest of justice. *See* WIS. STAT. § 752.35 (The court of appeals has the discretionary power to reverse a conviction in the interest of justice.); *State v. Armstrong*, 2005 WI 119, ¶113, 283 Wis. 2d 639, 700 N.W.2d 98 (same). Specifically, he contends that justice has miscarried because the trial court's verdict in the responsibility phase was against the great weight of the evidence presented at trial.

## ¶25 WISCONSIN STAT. § 752.35 provides:

**Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

- ¶26 Under WIS. STAT. § 752.35, we may grant a discretionary reversal "if it is likely for any reason that justice has miscarried." *State v. Murdock*, 2000 WI App 170, ¶31, 238 Wis. 2d 301, 617 N.W.2d 175. "We may conclude that justice has miscarried if we determine that there is a substantial probability that a new trial would produce a different result." *Id.* We exercise our discretion only in exceptional cases. *See Armstrong*, 283 Wis. 2d 639, ¶114; *State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60.
- ¶27 At trial, Vento had the burden to establish that he was not guilty by reason of mental disease or defect "to a reasonable certainty by the greater weight of the credible evidence." *See* WIS. STAT. § 971.15(3). This requires that he affirmatively prove that he (1) had a "mental disease or defect" at the time the offense was committed; and (2) "[a]s a result of the mental disease or defect," lacked "substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *See* WIS JI—CRIMINAL 605 (2011).
- ¶28 We agree with Vento that there is a substantial probability that a new trial would produce a different result because he met his burden under WIS. STAT.

§ 971.15(3). See **Murdock**, 238 Wis. 2d 301, ¶31. The evidence showing that Vento lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was, as we will discuss more fully below, very strong, and certainly comprised "the greater weight of the credible evidence." See WIS. STAT. § 971.15(3). But the trial court effectively required not only a showing that Vento lacked substantial capacity to appreciate the wrongfulness of his actions or to conform his behavior to the requirements of the law, but also a showing that there was no other possible explanation for his behavior. This is not the correct standard. See id. Had the trial court applied the correct standard in assessing the evidence, it is very likely that the court would have determined that Vento did in fact lack substantial capacity to appreciate the wrongfulness of his actions or to conform his behavior to the requirements of the law. Furthermore, the portions of testimony on which the trial court relied in making its determination, i.e., Dr. Collins' testimony, were purely speculative. Dr. Collins' theory that anger and aggression were "possible" causes of Vento's conduct at the time of the attack was not supported by any evidence.

Murdock, in which we reversed and remanded for a new trial. In Murdock, the defendant went on a rampage and stabbed three of his neighbors, killing one. Id., 238 Wis. 2d 301, ¶¶3, 5-6. The rampage began when Murdock had an argument with his wife in their home and threatened his family with a knife; when his family fled, the defendant went outside and fatally stabbed a neighbor. Id., ¶¶5-6. He then forced his way into the home of two other neighbors and stabbed both of them. Id., ¶6. The defendant was charged with numerous counts, including first-degree reckless homicide. Id., ¶3. He pled not guilty and not guilty by

reason of mental disease or defect. *Id.*, ¶1. Evidence at trial established that the defendant had mental health issues for many years prior to the incident, and had taken medication. *Id.*, ¶5. On the date of the incident, however, he did not take his medication. *Id.* A psychologist and psychiatrist both testified at trial that the defendant suffered from a mental disorder, though they did not agree on which one, and both testified that the disorder caused the defendant to lack substantial capacity to appreciate the wrongfulness of his actions and to conform his behavior to the requirements of the law. *Id.*, ¶¶7-9. The State, on the other hand, argued that the stabbings did not derive from the defendant's mental illness, but rather, from a display of anger and frustration. *Id.*, ¶15. In support of this argument, the State pointed out that once the defendant realized he had done something wrong, he tried to avoid responsibility. *Id.* The jury found that the defendant did not prove that he lacked substantial capacity to appreciate the wrongfulness of his actions or to conform his behavior to the requirements of the law. *Id.*, ¶16.

¶30 Our analysis in *Murdock* directly applies here, first, because Vento had a history of mental illness—in his case, dating back to the 1980's—and he was not taking his medication on the day of the attack. *See id.*, ¶40. Additionally, as in *Murdock*, there was no suspicion that Vento was malingering. *See id.*, ¶¶ 8, 41. The State argues that Vento's circumstances are different that *Murdock*'s because the defendant in *Murdock* was only off his medication for a day, whereas Vento was off his medications for the year preceding the attack—a point which, the State argues, shows that Vento was able to conform his behavior to the requirements of the law. However, we disagree because over the course of the year that Vento was off his medications he went to the police station approximately thirty to forty times to report on his "undercover work" he was

doing with the FBI and/or CIA. This is, in our opinion, evidence that Vento was delusional, acted on his delusions, and could not conform his behavior.

¶31 Second, as in *Murdock*, the expert testimony did not directly conflict. *See id.*, ¶40. Although only Dr. Jaramillo supported the plea, Dr. Collins could not discount that there was support for it. Indeed, Dr. Collins acknowledged that Vento was symptomatic at the time of the incident and acknowledged that it was possible that Vento was acting because of paranoid delusions he had about his neighbor. Moreover, Dr. Collins lacked information in forming her conclusions that she admitted would have been relevant, including that: (1) Vento alleged that the victim hit him with a hammer the day before the attack; (2) Vento alleged to have bumps—which did not exist—on his head from the alleged attack; (3)Vento had asserted that the victim had propositioned him the day before the attack and claimed to have reported this to the police; and (4) Vento had gone to the police on a weekly basis to report on various undercover operations. In sum, while one expert clearly supported the plea, the other was more neutral on the matter, and her opinion was not based on all of the relevant information.

¶32 Third, as in *Murdock*, there was a lack of evidence of other explanations for the behavior. *See id.*, ¶44. While the State emphasizes Dr. Collins' testimony that anger and aggression were "possible" causes of Vento's conduct at the time of the attack, we agree with Vento that this testimony is not persuasive because there is insufficient evidence to support Dr. Collins' theory. Specifically, we think that Dr. Collins' testimony about an alleged 2002 battery—an allegation that, if true, did not result in conviction—is far too attenuated to indicate that Vento was acting out of anything other than his delusions at the time of the incident in 2010. Because Vento's history of mental illness dates to the 1980's, it is equally "possible" that the 2002 alleged battery

was as impacted by his mental illness as by any "anger" or "aggression" he may have felt. Furthermore, the fact that Vento's neighbor was afraid of him was directly connected to Vento's paranoid delusions—not to any separate anger or aggression issues.

¶33 Fourth, as we did in *Murdock*, we conclude that evidence that Vento "appeared to be behaving rationally in some instances does not mean that he was generally able to control his behavior or appreciate its wrongfulness" at the time of the attack. *See id.*, ¶44. Indeed, in this particular case, the fact that Vento appeared to behave rationally at the time of his arrest—by not resisting, and by being cordial with police during booking—only strengthens the conclusion that Vento was acting upon a delusion when he attacked his neighbor.

¶34 Similarly, we agree with Vento that the facts of his case are analogous to State v. Kemp, 61 Wis. 2d 125, 211 N.W.2d 793 (1973), a case in which the supreme court granted a new trial to a man convicted of murdering his wife. In *Kemp*, the defendant was a Vietnam veteran who developed battle-related neurosis. *Id.* at 133-34. He was intermittently seen at the Veterans Administration Hospital on an inpatient and outpatient basis for treatment of his mental and emotional problems. *Id.* at 134. "He complained of ... recurring dreams of Vietnam violence, suspicion and hostility toward others, alcoholism, and drug use." Id. Shortly after being released from outpatient status, Kemp shot his wife. *Id.* at 132. He had no recollection of shooting her, but explained that while he was sleeping he had a dream that he was being attacked by the Viet Cong, that he killed some of them, that the sound of the shots awoke him, and that when he awoke, his wife was in bed with him, dead. Id. at 134. The supreme court reversed Kemp's conviction, concluding that he lacked the capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. *See id.* at 138-39.

¶35 Several of the factors underlying the decision to grant Kemp a new trial are present in Vento's case. For example, like *Kemp*, Vento has a long history of mental illness. *See id.* at 137-38. Additionally, as in *Kemp*, there is no concern that Vento was malingering. *See id.* Also, as in *Kemp*, there was no unequivocal testimony that Vento lacked substantial capacity to appreciate the wrongfulness of his actions or to conform his behavior to the requirements of the law. *See id.* at 138. While the State argues that *Kemp* is distinguishable because Vento, unlike Kemp, was able to recall attacking his neighbor, Vento's recollection of the incident itself—with Vento's insistence that his neighbor had been propositioning him for a long time and that on the day of the attack the neighbor was armed with either a gun or a hammer—is evidence of the fact that Vento was acting upon a delusion when he attacked his neighbor. Therefore, we conclude that, even taking the difference the State highlights into consideration, *Kemp* is analogous to the case before us.

¶36 In sum, for the reasons we discussed, we grant a discretionary reversal under WIS. STAT. § 752.35 on the issue of Vento's mental responsibility because it is likely that justice has miscarried. We consequently remand with directions to conduct a new trial only on the issue of Vento's mental responsibility. *See* WIS. STAT. § 971.165(1)(c)3.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.